Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1385

GARY ALLEN MAY,
Petitioner.
-vs-
STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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ON PETITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No._____

GARY ALLEN MAY,
Petitioner.

-vs-

STATE OF INDIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Gary Allen May, by his attorney K. Richard Payne, prays that a writ of certiorari issue to review a) the judgment of the Supreme Court of Indiana in denying transfer and b) the judgment and opinion of the Indiana Court of Appeals upon May's conviction for possession of Marijuana in violation of IC 1971, 35-24. 1-2-4 (d) (10) (Burns Code Ed.)

OPINION OF THE INDIANA COURT OF APPEALS

The opinion of the Indiana Court of Appeals has been officially reported, and is cited in 364 NE 2d 172. A copy is reproduced herein as Appendix "A" to this petition.

JURISDICTION

1. The judgment of the Court of Appeals of Indiana was entered on July 5, 1977.

2. A timely Petition for Rehearing was filed with the Clerk of the Court of Appeals on July 22, 1977. A copy is reprodeced herein as Appendix "B".

3. A Petition for Transfer was filed with the Indiana Supreme Court on September 1, 1977 and denied on December 5, 1977. A copy is reproduced herein as Appendix "C".

4. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, 1257 (3)

QUESTIONS PRESENTED

1. Were rights of the defendant under the Fourth and Fourteenth Amendment to the Constitution of the United States violated when the trial court allowed into evidence, over the objection of the defendant, contraband seized under the "plain view" doctrine?

CONSTITUTIONAL PROVISIONS

Fourth Amendment to the Constitution of the United States reads as follows:

> "Unreasonable searches and seizures.--The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of Amendment 14 to the Constitution of the United States reads as follows:

> "Citizenship--Due process of the law--Equal protection.--All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On the evening of July 30, 1974, two on-duty narcotics officers from the Allen County Sheriffs Department, Officers Charles Meeks and Joel Working, entered the private property of Gary May at approximately 10:30 p.m. Their purpose, according to Working, was specifically to look for two particular juveniles (Tr. P. 126.) The Allen County Sheriffs Department maintained a separate and different Juvenile Aid Division whose particular responsibility was runaway juveniles. (Tr. P. 39). Meeks and Working were assigned to narcotics (Tr. P. 39).

Officer Meeks had received twenty-seven (27) day old information that two (2) juveniles named Bodenheimer were missing from their homes (Tr. P. 62). He also had ten (10) day old information from an unnamed informant which did not deal specifically with the Bodenheimer girls (Tr. P. 104).

The testimony is conflicting in that Meeks stated that the information was not that the girls were there; only that they might be there (Tr. P. 44). However, the affidavit for probable cause later filed in connection with Mays case listed information that juveniles were residing at 5710 E. Dupont Road (Tr. P 42). He also stated that the house at 5710 E. Dupont Road had been known for the congregation of juveniles.

The officers approached the rural country house and used the standard surveillance technique of driving by the property and looking at the grounds.

They drove by the address, then turned around and drove by again (Tr. P 48). They turned around again and then went back to May's address. They saw a female figure in the front yard but couldn't determine her age because it was dark (Tr. P. 108).

The officers parked at the end of the driveway away from the house itself. Officer Working stated that Officer Meeks met the defendant at a distance of about twenty (20) feet (tr. P. 119) from the front of the door. May immediately told him to leave in harsh terms (Tr. P. 46-51). As the officer brushed by May, he stated that he observed marijuana through the lighted front of the house. Shortly after Meeks met May, Meeks was in the house (Tr. P.110). Meeks walked past and around May as May restrained Meeks all the while Meeks was walking into the house (Tr. P. 110).

Gary May was arrested for possession of marijuana. At the hearing on the oral motion to suppress held immediately before trial, the officers testified that despite their suspicious information, no search warrant had been issued for that address or arrest warrant for the occupant (Tr. P. 45). Narcotics Officer Meeks testified that he was not in hot pursuit of a felon, that he had no invitation to enter the property, and that in fact no emergency existed (Tr. PP 45-46,63). There was no prior establishment of the unnamed informer's credibility or reliability (Tr. P. 66). No juveniles were even found at the Dupont Road address.

May was convicted and sentenced to five (5) years imprisonment.

SUMMARY OF ARGUMENT

In summary, petitioner argues that the police officers were not in a place they had a right to occupy at the time the

Marijuana was observed, and thus the "plain view" doctrine would not relieve the officers of the responsibility of obtaining a warrant based upon probable cause before intruding upon the premises of Mr. May to determine whether juveniles were present. Second, assuming for argument purposes only that the police could come on to the property late at night for an investigatory purpose, the facts of this case dictate that the "open view" doctrine in dispositive (as opposed to the legal principle of plain view) and that a warrant was still necessary as the officer himself stated that no emergency existed at the time the contraband was seized (Tr. P 63).

ARGUMENT

A.

In Katz v. United States, (1967), 389 N. S. 347, the U.S. Supreme Court ruled that the Fourth Amendment protected those areas in which a person has a reasonable right to expectation of privacy from unreasonable governmental intrusions. It has been routinely held that a person's home and the immediate area surrounding it are such that there is a reasonable expectation of privacy especially during the night time hours.

United States v. Davis, (1970, 5th Cir). 423 F. 2d 974;

Texas v. Gonzales, (1968, 5th Cir). 386 F. 2d 145;

Brock v. United States, (1955 5th Cir). 223 F. 2d 681;

Fullbright v. United States (1968 10th Cir). 392 F. 2d 432;

Fixel v. Wainwright, (1974, 5th Cir), 492 F. 2d 480;

Watten v. United States, (1968, 9th Cir). 386 F. 2d 853; and,

California v. Hurst, (1963, 9th Cir). 325 F. 2d 891.

In Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed 2d 546 (1971) this Court established a rational standard governing police conduct in the protection of the 4th Amended Constitutional rights by strictly limiting warrantless searches to specifically listed exceptions:

> "3. The valid presence inside a 'constitutionally protected area' for some legitimate purpose other than the search for evidence of the accused."

91 S. Ct. at 2038

The Court referred as example to Lewis v. U. S., 385, U.S. 206, 875 Ct.424 17 L. Ed 2d 312 where an undercover agent had been present by invitation.

The Court stated:

> "What the plain view cases have in common is that the police officer, in each of them, had a prior justification for intrusion in the course of which he came inadvertently across a piece of evidence incriminating to the accused...the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. 403 U.S. at 466-67, 91 S. Ct. at 2038."

In its opinion in this cause, issued on July 5, 1977, the Indiana Appeals Court held that Allen County Sheriff's Officer Meeks had sufficient legal cause of right for his presence in Defendant May's front yard at 10:30 p.m. at night on July 30, 1974, such that Meeks' subsequent observation, through a window, of marijuana inside the house fell within the "plain view" exception to the strict Constitutional requirement of securing a search warrant based on probable cause prior to entering upon a citizen's property to conduct a search; see Opinion Appendix"A"

In essence, the Indiana Court has held that a police officer has the right to enter on private property when conducting a potential criminal investigation which is not based on probable cause to believe that a crime has been or is being committed.

The crucial issue in this case is whether Officer Meeks had the "right" to be on the property which Defendant May was legally occupying at the time he observed the marijuana in the house. The question is, of course, dispositive to the determination of the issues in this case because if Officer Meeks was not rightfully on May's property, then his seizure of the marijuana does not fall within the "plain view" exception.

The question of a police officer's "right" to enter on private property, without prior invitation, and to remain there after being asked to leave, when he is seeking information about possible or suspected illegal activity (where he lacks probable cause to believe that a crime has or is being committed), the very nature of which investigation might subject the occupant to criminal liability, has apparently never been considered by an appellate court in Indiana prior to the Court's decision in this case.

It is clear from the record that Officer Meeks did not have evidence sufficient to establish probable cause to believe that anyone had committed or was committing a crime, either felony or misdemeanor at 5710 East Dupont Road on July 30, 1974. It is also clear from the very nature of the investigation itself (seeking to determine whether two runaway underage females were staying at 5710 East Dupont Road) that possible criminal liability could attach to the occupant of the residence. Suspicion in advance (including visual observation at a female in the front yard) that entry upon the premises might reveal the presence of the runaway female juveniles would, of its very nature also entail a suspicion that the occupant could be in

violation of IC35-14-1-1 Harboring, IC35-30-5-1 Encouraging, or IC35-14-1-1 Contributing to the Delinquency of a Minor. The officer's late evening entry upon the premises after first driving around and past the rural house and then backing up to the drive (a standard surveillance technique) support an inference that a criminal investigation was involved. Also, Officer Working testified that their mission was 'specifically to look for two particular females' (Tr. P 126). Consequently, at the point of entry upon the property, Officer Meeks was not justified in having been in the particular place of observation.

In a well researched and studied opinion, the Court in Brown v. United States 15 Md App. 584, 292 A 2d 762 (1972), examined Coolidge and found that that case's fundamental proposition

is that searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the 4th Amendment subject only to a few well delineated exceptions such as emergency and prior justification.

> "In enunciating the rationale for the plain view exception, Coolidge sets out 'the two distinct constitutional protections served by the warrant requirement'. "It protects against any intrusion in the way of search or seizure" which is not justified by a 'careful prior determination of necessity.' It then indicates that even 'those searches deemed necessary should be as limited as possible." It reasons that the "plain view" exception is not in conflict with the first objective because the plain view does not occur until after the valid intrusion has already been made. . . Thus, the formal "plain view" doctrine, as announced in Coolidge is exclusively a post-intrusion phenomenon.
>
> 292A 2d at 774.

Whether the prior justification for entry into the front yard curtilage of the property is justified depends upon the intent of the officers at the time of entry.

The Indiana Supreme Court in Alcorn v. State (1970), 255 Ind. 491, 265 N. E. 2d 413, quoting from Marshall v. United States(5 Cir. 1970), 422 F. 2d 185, at 496 of 255 Ind., at 416 of 265 N. E. 2d, stated:

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest. Haerr v. United States, 5 Cir. 957, 240 F. 2d 533, 535.

The Indiana Appellate Courts did not consider the officers presence a search. However, this holding ignores several pertinent facts including a) Officer Working's statement of the reason for the original entry into the property; b) the surveillance technique used; c) the citing before entry of a female in the front yard.

In the present case a state agent entered the rural enclosed property of a citizen during the dead of night to search

for the presence of two specific runaway, underage females on the property. This constituted a criminal investigation the very nature of which the officer knew could result in criminal arrest of the occupant of the property. Thus, the exploratory investigation or quest requirement of Haerr, supra is satisfied.

The opinion of the Indiana Appeals Court held that Officer Meeks had a right to be in May's front yard at 10:30 p.m. based expressly on the holding in Davis v. United States, (1964, 9th Cir), 327 F 2d 301. The quotation of the Court of Appeals ignores the important caveat to Davis opinion which takes into consideration the time of day in determining the reasonableness of the intrusion. The reasoning in Davis seems to be that since anyone (including a police officer) can approach a house and

knock on the door in order to make inquiries of the occupant, absent express orders against trespassing, then there is no expectation of privacy on the part of the resident to be protected from this type activity.

The facts in Davis, briefly stated, are that three plain clothes officers went to Davis' house during daylight hours to question him about drugs. They had no probable cause to arrest him or search his house. The officers knocked on Davis' front door and were admitted inside the house by a young girl. Once inside, they saw marijuana in "plain view" and seized it. (327 F 2d 302-303).

In Davis, entry upon the front walk per se would not have revealed evidence of guilt. In May, the officer's entry upon the grounds itself was for the purpose of conducting an "exploratory quest" to determine whether the runaway juveniles were present on any part of the grounds, including the front yard.

In neither the Davis or May situation does the officer have probable cause, and both are intrusions by the State upon a citizens privacy. The analogy to an ordinary citizen's limited license to trespass on private property for the purpose of knocking on the front door to make business inquiries is not very satisfactory because the Fourth Amendment is an express constraint on police activity, but not that of a private citizen. Thus, in some cases what a private citizen could do, a police officer might be constrained from doing or at the least the evidence seized by such an intrusion will be excluded.

The distinquishing difference between Davis and May seems to be that in Davis, the police officers went to the door in broad daylight during the time of day when one normally expects unlimited persons to arrive at one's front door (commercial business hours). Apparently,

the Court in Davis felt that this was such a slight intrusion on a resident's privacy that it was of little consequence.

In the very next paragraph following the paragraph quoted from Davis by the Indiana Appeals Court in its opinion, the Davis Court stated:

> "The time of day, coupled with the openness of the officers' approach to defendant's doorway, rules out the possible dangers to their persons which might have resulted from a similar unannounced call in the dead of night. (citations omitted).
>
> 327 F 2d at 304

Officer Meeks did not approach Defendant May's home at noon in the bright sunlight as did the officers in Davis. Meeks arrived at 10:30 p.m. after dark, and as the Davis Court pointed out an unannounced night time visit is totally different from one made in the daytime. What might be an excusable trespass during the day, may well not be one at night.

In United States v. Davis, 423 F 2d 974, t

Court made the following comments:

> "The main consideration in applying this rule is to determine whether the observing officer had 'a right to be in the position to have that view'. Many of the cases involving the 'plain view' doctrine concern evidence recovered from authorities located in public places. The rule lends itself to application in those situations because the observing officer is not required to trespass on private property in order to have a clear view of articles inside an automobile. However, where police officers trespass in order to secure the view, we have not hesitated to find a search. A persons home holds a favored position in the list of those areas which are protected from unreasonable searches and seizures. **** the high degree of judicial sanctity which the courts have accorded to dwellings is based upon its concept of privacy and the right to be left alone. The security of homes should not be left to the sole discretion of police officers. The decisions have repeatedly stressed and emphasized the concept that the underlying purpose of the Fourth Amendment is to protect and shield citizens from unwarranted intrusions into their private domain. Here we are dealing with a severe invasion of privacy by the intrusion of officers into the curtilage of a private home at night time."
>
> 423 F. 2d 974 at 977
> Emphasis added

There are some cases which seem to suggest that a trespass by the officer will not invalidate a "plain view" seizure, but a closer examination of these cases where the Court found no reasonable expectation of privacy to be involved due to the nature of the property, the nature of the activity or contraband being in open areas away from residences.

See: Hester v. United States, (1924) 265 N. S. 57.

Thus, under the applicable case law, the 4th Amendment guarantees defendant May's privacy during the night time hours at least.

The above conclusion conflicts sharply with the result reached by the Indiana Appeals Court, which inpermissably expands the Davis, supra, holding. The cases generally cited in support of 'prior justification' are those in which someone expressly assented to the original entry. In State v. Warness 26 Arz. App 359, 548 P. 2d 853, the Court held for the State on the 'lawful presence,--plain view exception argument but based its ruling on the fact that the defendant had requested the police presence to investigate a possible burglary. Davis, supra, cited by the Indiana Court of Appeals is based on a fact situation in which the police were invited onto the premises. In State v. Ballinger, 504 P 2d 955, the admission of evidence in plain view was based on the fact that the police had been requested to solve a family dispute.

The correct line of authority which the trial court should have followed on the suppression question is that of Trupiano v. United States, 334 U. S. 709, 68 S. Ct. 1234, where the Court held that all exceptions to the warrant requirement

grew only out of necessity and therefore the exceptions would not apply when there had been an opportunity for an agent to obtain a warrant. Because no emergency existed, Meeks should have obtained a search warrant before searching the grounds for the juveniles, the finding of whom would have subjected May to criminal prosecution. It is certainly true that, once the marijuana came into plain view from the officers illegal position, probable cause existed to suspect an ongoing crime. However, under State v Speitz, 531, P 2d 521 (Alas, 1975) the seizure is unconstitutional because plain view alone will not justify an entry into a private residence since plain view is not in itself an exception to the warrant requirement. Probable cause in itself does not justify a warrantless search and seizure of

evidence. With respect to a fixed premises, no amount of probable cause will justify an intrusion. Johnson v. United States, 333 U. S. 10, 68 S. Ct. 367, 92L Ed 436 (1948); Jones v. United States, 357 U. S. 493, 78 S Ct. 1253, 26 L Ed 2d 1514 (1958). Absent exigent circumstances, there is no justification for a warrantless entry of property at night time. United States v. Calhoun, 542 F 2d 1094 (1976)

B

Assuming for argument purposes only that police justifiably occupied the position from where the contraband was cited, and that the front yard was not within the expected zone of privacy, a search warrant for marijuana was still required under the facts of May's case. Warness, supra, held that a different situation exists when the police viewed the evidence from outside the protected area, as through a window. This is sometimes termed "open view" and a warrant

must be obtained for a lawful search absent exigent circumstances. Open view can provide probable cause for a warrant but cannot alone justify a warrantless intrusion of the protected area. Brown v State 15 Md. App. 584, 292 A 2d 762 (1972). In Brown, supra, open view observation from a hallway outside the threshold of the renter's room was not considered to be of any legal consequence. In that case, the relevent threshold had not been crossed and without a warrant it could not be crossed. Brown, supra, at 778.

In Steel v United States, 267 U. S. 498, 45 S. Ct. 414, 69 L Ed 757 (1925) this Court held that open view of whiskey from outside a building did not justify immediate search and seizure. In Taylor v. United States, 286 U. S. 1, 52 S. Ct. 466, 76 L Ed 951 (1932) agents looked into a garage and saw contraband in open view.

The subsequent warrantless seizure was suppressed. In the present case, the arresting officer testified that no emergency existed at the time he entered May's yard. Coupled with the fact that the officer observed a large amount of marijuana (34 lbs) and would have to know that such a quantity could not be easily hidden or destroyed, no exigent circumstance existed which would excuse the avoidance of the warrant requirement.

CONCLUSION

At best May literally stands for the proposition that the police may enter a person's private property at any time he desires in order to question the occupants of the property about any criminal activity, no matter how nebulous. At worst, it provides the police with a convenient method of eradicating the 4th Amendment privacy guarantees. It was the very

specter that the Court in Brown supra, at 776 warned of when it stated that a continued investigatory reconnaissance could not be allowed as a means of evading the warrant requirement for search and seizure.

It may well be that this is a fine line which Defendant May seeks this Court to draw, but the implications of this Court's holding in May's cause effect not only him, but also every other citizen's rights to be left alone and not be bothered by police intrusions upon their property. Defendant May believes that under the limited facts of his particular case, that this Court cannot allow the conviction to stand without placing in serious jeopardy the Fourth Amendment right of all citizens to their precious and constitutionally protected privacy.

For the foregoing reasons, Petitioner Gary May, prays that a Writ of Certiorari

issue to review the Judgment and opinion of the Indiana Court of Appeals entered in these proceedings

Respectfully submitted

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ROBERTSON, C. J. and GARRARD, J. by designation concur.

Gary Allen MAY, Defendant-Appellant.

v.

STATE Of Indiana, Plaintiff-Appellee.

No. 3-1175A246.

Court of Appeals of Indiana
Third District

July 5, 1977.

Rehearing Denied Aug. 12, 1977.

Defendant was convicted in the Superior Court, Allen County, Louis I. Bloom, J., of possession of marijuana and he appealed The Court of Appeals, Hoffman, J., held that where a police officer walked up to the front door of the defendant's residence with some questions concerning two missing individuals and noticed marijuana in plain view through a window next to the door, the marijuana could be seized and was admissible in evidence under the "plain view" doctrine.

Affirmed.

1. Searches and Seizures 3.3(4)
Critical element involved in allowing warrantless seizure of contraband from private place because it was observed in plain view is that seizing police officers must be justified in having been in particular place of observation. U.S.C.A. Const. Amend. 4.

2. Criminal Law 394.4(3)
Drugs and Narcotics 185

Where police officer walked up to front door of defendant's residence with some questions concerning two missing individuals and observed marijuana through front window next to door, marijuana could be seized and was admissable under "plain view" doctrine. U.S.C.A. Const. Amend. 4.

John F. Surbeck, Jr. Grimm & Grimm, Fort Wayne, for defendant-appellant.

Theodore I. Sendak, Atty. Gen., James N. Shumaker, Deputy Atty. Gen., Indianapolis, for plaintiff-appellee.

MAY v. STATE
Cite as 364 N. E. 2d 172 Ind. 173

HOFFMAN, Judge.

Defendant-appellant Gary Allen May was convicted of possession of marijuana in violation of IC 1971, 35 24.1 2 4(d)(10) (Burns Code Ed.) After a trial by jury May was sentenced to the Indiana Department of Correction for a period of five years and fined in the penal sum of $1. After the overruling of his motion to correct errors May perfected this appeal alleging that the trial court erred in its denial of his motion to suppress evidence seized during an allegedly warrantless search of his home.

The record reveals that on July 30, 1974, the date of May's arrest, Charles B. Meeks, a Senior Detective Sergeant of Allen County was investigating information he had received concerning a place frequented by juveniles with regard to two missing young women. Officer Meeks testified that he went to the residence at 5710 East Dupont Road, in Fort Wayne, Indiana, in hopes that

he could link the information received about a gathering place for youths with his search for the whereabouts of the two young women.

At approximately 10:30 p.m. Officer Meeks, with another officer, drove by the residence observing a man and woman building a fire in the yeard. The officers turned around and drove past the house a second time, then came back and drove into the end of the driveway. Several other cars were parked on the lawn in front of the house. Officer Meeks got out of the car and started to walk on the pavement to the front door. Appellant May came from inside the house and intercepted Officer Meeks who had begun to identify himself. As May gave him a shove saying, "Get the hell out". Officer Meeks observed in the house through the lighted window approximately eight feet away, a set of scales and marijuana in bricks and loose on a picnic table. Together the two police officers then went into the residence and proceeded to arrest all of those present. At trial appellant made a motion to suppress the evidence seized from the premises during the arrest.

The sole issue raised on appeal concerns whether the trial court erred in denying appellant's motion to suppress the contraband evidence.

Appellant contends that the officers' entrance into his home to seize the marijuana constituted an unreasonable search and seizure in violation of his

Fourth Amendment rights. Officer Meeks it is agreed, was on constitutionally protected property when he made his observation through the window. In response the State argues that Officer Meeks did not carry out a search at all; rather he is said to have observed the contraband in plain view of a place he rightfully occupied.

Drawn into question therefore is whether the contraband observed by Officer was in plain view and as a corolliary whether he was justified in being on the premises and so situated as to make the observation.

Indiana has allowed the warrantless seizure of evidence which was within the plain view of an arresting officer. Lindsay v. State (1965), 246 Ind. 431, 204 N.E. 2d 357; Brown v State (1959), 239 Ind. 358, 157 N.E. 2d 174; Johnson v, State (1975), Ind. App. 325 N. E. 2d 859. The standard followed has generally been one of reasonable police behavior under the particular circumstances of each case. Our Supreme Court in Lindsey v. State, supra, had occasion to consider whether police observations made through the screen door of the defendant's trailer-residence is a mobile home sales lot were justifiable. The court upheld the seizure of the stolen property as being reasonable upon grounds that there was no prying and the contraband taken was not hidden but rather was in plain view. Lindsey v. State, supra.

Our Supreme Court in Alcorn v. State (1970) 255 Ind. 491, 265 N. E. 2d 413, quoting from Marshall v. United States (5 Cir. 1970), 422 F.2d 185, at 496 of 255 Ind. at 416 of 265 N. E. 2d stated:

"A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest. Haerr v. United States 5 Cir 1957, 240 F 2d 533, 535"

(1) One of the critical elements involed in allowing the warrantless seizure of contraband from a private place, because it was observed in plain view, is that the seizing police officers must be justified in their having been in the particular place of observation.

In Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, the United States Supreme Court discussed the circumstances under which police officers may seize evidence in plain view without a warrant. The court noted that plain view alone is not enough to justify the warrantless seizure of evidence. The police officer must have "had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." (At 466 of 403 U.S., at 2038 of 91 S.Ct.)

(2) Officer Meeks' testimony and the pictures of the house placed in evidence support the proposition that the evidence was in plain view. However, May's further argument goes to whether there was justification for the police intrusion, that is, was Officer Meeks properly on the front walk.

Among several contingencies justifying the initial intrusion under Coolidge, at 466 of 406 U.S. at 2038 of 91 S. Ct., is included, "Some other legitimate reason for being present unconnected with a search directed against the accused."

The evidence shows that Officer Meeks was pursuing an investigation concerning the whereabouts of two young women reported missing from their parents. He was not pursuing a narcotics investigation, nor was he involved in a search directed against the accused. Instead, upon the advice of a confidential informant, Officer Meeks was attempting to verify a tip that the missing juveniles were staying there. Moreover, Officer Meeks' presence was in no way different from that of any other person who might solicit the occupant of a residence for information by knocking on his front door. It was only after having observed contraband through the window that the nature of Officer Meeks' mission changed.

The Court of Appeals for the Ninth Circuit in Davis v. United States (1964) 327 F.2d 301, considered any police activity which provided an officer with a sufficient legitimacy of purpose including investigation as a reason adequate for walking up to the door of a private home. The court at 303 of 327 F.2d, stated:

> "Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peacably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof--whether the questioner be a pollster, a salesman, or an officer of the law."

In the case at bar Officer Meeks merely walked up to the front door of the May residence with some questions concerning the two sisters sought by their parents. Several other cars were parked on the lawn and a couple was building a fire in the midst of lawn chairs positioned in a circle around them. The primary light in the area came from the front window next to the door wherein Officer Meeks saw the picnic table with contraband strewn over its surface.

In this context it is clear that the evidence which was in plain view was observed by an officer rightfully in a position to have such a view and as such should not be regarded as having been discovered through a search. Johnson v. State, supra (1975), Ind. App., 325 N.E. 2d 859; See also Alcorn v. State, supra (1970), 255 Ind. 491, 265 N.E. 2d 413; United States v. Hannan (7 Cir. 1971), 442 F.2d 649. Once the contraband fell into Officer Meeks' "plain view", it was subject to seizure and properly admissible in evidence. Brown v. State, supra (1959), 239 Ind. 358, 157 N.E.2d 174; Harris v. United States (1968), 390 U.S. 234, 236, 88 S. Ct. 992, 19 L. Ed. 2d 1067.

Accordingly the judgment of the trial court must be affirmed.

Judgment affirmed.

GARRARD, J. concurs.

ROBERTSON, C.J., participating by designation concurs.

Tyrone Curtis HENDERSON,
Appellant-Defendant,

v.

STATE OF INDIANA, Appellee-Plaintiff
No. 3-1275A279.

Court of Appeals of Indiana
Third District

July 6, 1977

Rehearing Denied August 3, 1977

Defendant was convicted in Circuit Court St. Joseph County. George N. Beamer, Jr., J., of committing a felony while armed and he appealed. The Court of Appeals, Staton, P.J., held that (1) statute providing upon permitting amendment of indictment or information the court shall order any adjournment or postponement which may be necessary to accord defendant adequate opportunity to prepare his defense does not mandate a continuance; (2) amendment of information to add language that another person was present, aiding and assisting the commission of the felony, did not prejudice defendant's substantial rights; (3) prosecutor's error in making statements in closing argument expressing disbelief of alibi witness and bolstering, by an opinion statement, the credibility of State's witness was harmless; (4) denial of motion in limine to exclude evidence of defendant's escape from county jail and charge on flight were harmless.

Affirmed.

Garrard, J., concurred in result.

Hoffman, J., concurred in result with opinion.

1. Criminal Law 590(1)

Statute providing that upon permitting amendment of indictment or information the court shall, upon motion by defendant, order any adjournment or postponement of the proceedings which may, by reason of such amendment, be necessary to accord

defendant adequate opportunity to prepare his defense does not mandate a continuance (Per Staton, P.J., with two judges concurring in result). IC 35-1-29-1, 35-3.1-1 5(a)(9) (1976 Ed.)

2. Indictment and Information 161(4)

Amendment of information to add language that another person was present, aiding and assisting the commission of a felony was immaterial to the extent that amendment permitted State to show that person other than defendant held the dangerous weapon and amendment did not prejudice the substantial rights of defendant. (Per Staton, P.J., with two Judges concurring in result). (C 35-1-29-1, 35-3.1-1-5(a)(9)(1976 Ed.)

3. Criminal Law 720 1/2

Prosecutorial opinions of the defendant's guilt or innocence are improper and prejudicial unless such opinions include the proviso that they are based solely upon the evidence, (Per Staton, P.J., with two Judges concurring in result.)

4. Criminal Law 1171.1(1)

The existence of prosecutorial misconduct does not necessarily constitute reversible error. (Per Staton, P.J., with two Judges concurring in result).

5. Criminal Law 1171.3

Prosecutor's remarks in closing argument expressing disbelief of alibi witness and bolstering, by an opinion statement, the credibility of State's witnesses, though error, were harmless (Per Staton, P.J., with two Judges concurring in result.)

STATE of INDIANA — INDIANAPOLIS, 46204

Clerk of the Supreme Court
and Court of Appeals — Telephone 633-5200

Billie R. McCullough, Clerk
217 State House

No. 3-1175A246
Gary Allen May v. State of Indiana

You are hereby notified that the Supreme Court has on this day, Appellant's Petition to Transfer DENIED without Opinion.
Givan, C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 5th day of December, 1977.

Thos. L. Sendak. Atty. Gen.
K. Richard Payne, Indpls.
John F. Surbeck, Jr.
Fort Wayne

12/5/77
No. 3-1175A246
I hereby acknowledge receipt of the above notice

_____ 19___

Attorney for_____

STATE OF INDIANA

INDIANAPOLIS, 46204

Clerk of the Supreme Court
and Court of Appeals

Telephone
633-3200

Billie R. McCullough, Clerk
217 State House

No. 3-1175A246

Gary Allen May v. State of Indiana

You are hereby notified that the Court of Appeals has on this day, Appellants Petition for Rehearing DENIED, Robertson, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 12th day of August, 1977.

3/12/77

No. 3-1175A246

I hereby acknowledge receipt of the above notice

_____197___

Attorney For_____

Theo. L. Sendak
Attorney General
John F. Surbeck, Jr.
Ft. Wayne
K. Richard Payne,
Indianapolis

Supreme Court, U. S.
FILED
APR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1385

GARY ALLEN MAY,
Petitioner,

vs.

STATE OF INDIANA,
Respondent

FROM THE INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. _____

GARY ALLEN MAY,
Petitioner,

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STATE OF INDIANA,
Respondent

FROM THE INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Were defendant's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States violated when the trial court allowed into evidence, over objection of the defendant, contraband seized under the "plain view" doctrine?

STATEMENT OF THE CASE

The petitioner, Gary Allen May, was convicted in the Allen Superior Court of Allen County, Indiana, of posses-

sion of marijuana in violation of I.C. 1971, 35-24.1-2-4(d)(10). On July 5, 1977, the Third District of the Indiana Court of Appeals affirmed the conviction, *May v. State*, — Ind. App. —, 364 N.E.2d 172 (1977) [Petitioner's Brief, Appendix A].

Defendant's Petition for Rehearing was denied on August 12, 1977, and the Indiana Supreme Court denied Appellant's Petition to Transfer on December 5, 1977.

STATEMENT OF THE FACTS

On July 30, 1974, the date of May's arrest, Charles B. Meeks, a Senior Detective Sergeant of Allen County was investigating information he had received concerning a place frequented by juveniles with regard to two missing young women. Officer Meeks testified that he went to the residence at 5710 East Dupont Road, in Fort Wayne, Indiana, in hopes that he could link the information received about a gathering place for youths with his search for the whereabouts of the two young women.

At approximately 10:30 P.M., Officer Meeks, with another officer, drove by the residence observing a man and woman building a fire in the yard. The officers turned around and drove past the house a second time, then came back and drove into the end of the driveway. Several other cars were parked on the lawn in front of the house. Officer Meeks got out of the car and started to walk on the pavement to the front door. May came from inside the house and intercepted Officer Meeks who had begun to identify himself. As May gave him a shove, saying, "Get the hell out", Officer Meeks observed in the house, through the lighted window approximately eight feet away, a set of scales and marijuana in bricks and loose on a picnic table. Together the two police officers then went into the residence and proceeded to arrest all of those present. At trial, May made

a motion to suppress the evidence seized from the premises during the arrest.

ARGUMENT

May contends that the police officers' entrance into his home to seize the marijuana constituted an unreasonable search and seizure in violation of his Fourth Amendment rights. Petitioner maintains that Officer Meeks was intruding upon constitutionally protected property without justification when he observed the contraband through the window. Further, May argues that even though the marijuana was in plain view, a search warrant was still required under the facts of this case prior to seizure of the evidence.

Indiana case law is clear that the warrantless seizure of evidence is permissible if it was within the "plain view" of the arresting officer. *Lindsey v. State*, 246 Ind. 431, 204 N.E.2d 357 (1965); *Brown v. State* (1959), 239 Ind. 358, 157 N.E.2d 174; *Johnson v. State*, — Ind. App. —, 325 N.E.2d 859 (1975). However, this court has held that the "plain view doctrine" is applicable only if the seizing police officer "had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused". *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971).

May does not dispute the lower court's finding that the evidence was in plain view, but bases his attack on the proposition that the Officer failed to justify his initial intrusion as having "some other legitimate reason for being present unconnected with a search directed against the accused." *Coolidge*, at 466 of 403 U.S., at 2038 of 91 S.Ct.

The record shows that Officer Meeks was pursuing an investigation concerning the whereabouts of two young

women who had been reported missing. The Officer was not pursuing a narcotics investigation, nor was he involved in a search directed against the defendant. Meeks was simply attempting to verify a tip that the missing juveniles were seen at the house. The officer's presence was in no way different from that of any other person who might solicit the occupant of a residence for information by knocking on his front door. It was only after having observed contraband through the window that the nature of Officer Meeks' mission changed.

In *Alcorn v. State,* 255 Ind. 491, 265 N.E.2d 413 (1970), the Indiana Supreme Court quoted from *Marshall v. United States*, 422 F2d 185 (5th Cir. 1970), at 496 of 255 Ind., at 416 of 265 N.E.2d:

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest." *Haerr v. United States*, 240 F2d 533, 535 (5th Cir. 1957).

State's evidence established that Officer Meeks walked up to the front door of the May residence with some questions concerning the two sisters. He was not seeking evidence to use against May. Several cars were parked on the lawn, and a couple was building a fire in the yard with the primary light in the area coming from the front window next to the door. May did not stop Meeks until the point at which the officer viewed the marijuana strewn over the picnic table. In this context, Meeks' inquiry was not a search; the evidence was in plain view and was observed by an officer rightfully in a position to have such a view. *Johnson v. State, supra; Alcorn v. State, supra; United States v. Hanahan*, 442 F2d 649 (7th Cir. 1971). Once the contraband fell into Officer Meeks' "plain view", it was subject to seizure and properly admissible in evidence.

Brown v. State, supra; Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

The Court of Appeals for the Ninth Circuit in *Davis v. United States*, 327 F2d 301 (1964) expressly held that investigation was a sufficiently legitimate purpose to justify walking up to the door of a private home.

> "Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law." at 303 of 327 F2d.

Petitioner attempts to distinguish *Davis* from the present case by arguing that the holding in *Davis* hinged on the time of day that the officer approached the defendant's residence. However, a further reading of the case discloses that the court did not consider the time of day when deciding the opinion:

> "It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light (citations omitted) . . . . if, without a search and without an unlawful entry into the premises, a contraband article . . . is seen in the premises, the police are not required to close their eyes and need not walk out and leave the article where they saw it." at 305 of 327 F2d.

Marshall v. United States, 422 F2d 185 at 189 (5th Cir. 1970) similarly held:

> "Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory. The plain view rule does not go into hibernation at sunset."

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully requests that this court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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